TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1[redacted]1921

No. 595. [redacted]11

WILSON SCOTT NORRIS, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JULY 18, 1918.

(26,651)

(26,651)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 565.

WILSON SCOTT NORRIS, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 10, 1919.

1 I. *Original Petition.*

Filed May 23, 1916.

In the Court of Claims.

No. 33262.

WILSON SCOTT NORRIS
vs.
THE UNITED STATES.

Petition.

To the Chief Justice and Judges of the Court of Claims:

The claimant respectfully represents and shows:

I. Claimant is a citizen of the United States and a resident of the State of Virginia.

II. Claimant was appointed to the office of Inspector of Customs, in and for the Port of Baltimore, Maryland, on July 2nd, 1907. After taking the oath of office for said office on said date, claimant was paid the compensation of Four ($4.00) dollars per diem for every day in the year. This appointment was made by the Secretary of the Treasury upon the nomination of the Collector of the Port of Baltimore.

2 III. Claimant continued under said appointment in said port at said compensation, to and including the 20th day of February, 1913. During the period between July 2nd, 1907 and February 20th, 1913, both dates inclusive, claimant received the full compensation of Four ($4.00) dollars per diem for every day in the year. On said date of February 20th, 1913, claimant was summarily discharged from the service of the United States by the Collector of the Port of Baltimore, who acted pursuant to instructions issued by the Secretary of the Treasury. No charges of any nature whatsoever were preferred against claimant, and no reasons were given to claimant for his removal.

IV. Claimant avers that his summary removal from the service of the United States, as aforesaid, was unlawful, invalid and of no force and effect, because it was contrary to Section VI. of the Act of Congress, approved August 24, 1912. (37 Stat. 555).

V. Following his removal, claimant made repeated requests upon the Treasury Department through the local officials at the Port of Baltimore for the reasons that caused his removal, and submitted applications at various times for his reinstatement. On March 5, 1914 claimant was restored to duty as an Inspector of Customs in and for the said Port of Baltimore, but was immediately suspended and charges in writing were preferred against him, and a copy thereof furnished to him with the notification that he was to answer said charges within three days after the receipt thereof. Claim-

3 ant submitted his answer to said charges to the Collector of the Port of Baltimore, and after due consideration thereof, the Treasury Department advised claimant through the said Collector of the Port of Baltimore, that the charges were not sufficient to have warranted claimant's dismissal from the service. The Treasury Department, however, informed claimant that there was no vacancy in the Port of Baltimore at that time to which he could be appointed, inasmuch as the position previously held by claimant had been filled by the appointment of another employee. Claimant was removed again on April 29, 1914, because it was alleged that there was no vacancy to which he could be appointed. Thereafter, and upon different occasions, claimant requested his reinstatement as an Inspector of Customs in and for the said Port of Baltimore, but said applications were consistently denied, solely on the ground that claimant's position had been filled by the appointment of another person, and that there were no vacancies in said office. Claimant has not received any part of the compensation for the said office of Inspector of Customs since the said 20th day of February, 1913.

VI. Claimant was, by virtue of his appointment, an employee of the Civil Service of the United States, under the Act of Congress, January 16, 1883, known as the Civil Service Law.

VII. During all the time from the date of claimant's removal on February 20th, 1913, as heretofore alleged, claimant has stood ready, willing and able to perform the duties of the office to which

4 he was legally appointed, and from which he was illegally separated. Claimant avers that he has been prevented from performing the duties of said office by direction of the Secretary of the Treasury or his subordinates.

VIII. Claimant avers that he was, and is entitled to the compensation of Four ($4.00) dollars per diem for each and every day from the 20th day of February, 1913 to and including the 20th day of May, 1916, eleven hundred eighty-five (1185) days, amounting to Forty-Seven Hundred Forty ($4740.) dollars.

IX. Claimant is the sole owner of this claim, no other person or corporation is interested therein, and no assignment or transfer of the claim, or any part thereof, or interest therein, has been made.

X. Claimant is justly entitled to the amount herein named from the United States, as he is advised and believes, after allowing all just credits and set-offs.

Wherefore, he prays judgment against the United States for the sum of Forty-Seven Hundred Forty ($4740.) dollars.

SPOOR & RUSSELL,
Attorneys of Record.

DUDLEY & MICHENER,
Of Counsel.

5 STATE OF NEW YORK,
County of New York, ss:

Personally appeared before me, a notary public, in and for the County of New York, William E. Russell, who being sworn according to law, deposes and says: that he is a member of the partnership

of Spoor & Russell, which partnership has been duly authorized by power of attorney, to represent the claimant and verify pleadings in this case; that he has read and understands the foregoing petition, and that the matters and things therein stated are true in substance and in fact, as he is informed and believes.

WILLIAM E. RUSSELL.

Subscribed and sworn to before me this 22nd day of May, 1916.

[SEAL.] E. E. LEVINE,
Notary Public, Kings Co.

Cert. filed N. Y. Co. County Clerk's Nos.: Kings Co. 77; N. Y. Co. 230. Register's Nos.: Kings Co. 8081; N. Y. Co. 8200.
Commission expires March 30, 1918.

6 II. *Claimant's Amendment to Petition.*

Filed, by Leave of Court, October 17, 1917.

To the Chief Justice and Judges of the Court of Claims:

The claimant respectfully amends the petition as follows:

Amended Paragraph VIII.

Claimant avers that he was and is entitled to the compensation of Four (*$4*) Dollars per diem for each and every day from the 20th day of February, 1913, to the day of rendering judgment in this case, the amount due to, and including the 30th day of September, 1917, being Six thousand seven hundred thirty-two ($6,732) Dollars.

Amended Conclusion of Law.

Wherefore, claimant prays judgment against the United States for the sum of Six thousand seven hundred thirty-two ($6,732) Dollars, the amount due at this time, and for such additional amount as may be due at the date of rendering judgment herein.

SPOOR & RUSSELL,
Attorneys of Record.

DUDLEY & MICHENER,
Of Counsel.

STATE OF NEW YORK,
County of New York, ss:

Personally appeared before me, a notary public in and for the County of New York, William E. Russell, who being sworn according to law deposes and says that he is a member of the partnership of Spoor & Russell, which partnership has been duly authorized by power of attorney to represent the claimant and verify pleadings in this case; that he has read and understands the foregoing amendments of petition, and that the matters and things therein stated are true in substance and in fact, as he is informed and believes.

WILLIAM E. RUSSELL.

7 Subscribed and sworn to before me this 2nd day of October, 1917.

[SEAL.] GEORGE E. BROWN,
Notary Public, Richmond County.

Certificate filed in New York County No. 321.
New York Register No. 9289.
Term expires March 30, 1919.

III. *General Traverse.*

Court of Claims.

No. 33262.

WILSON SCOTT NORRIS

vs.

THE UNITED STATES.

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

IV. *Argument and Submission of Case.*

On March 6, 1918, this case was argued and submitted on merits by Mr. W. E. Russell, for the claimant, and Mr. Harvey D. Jacob, for the defendants.

8 V. *Findings of Fact and Conclusion of Law.*

Entered May 13, 1918.

This case having been heard by the Court of Claims the court, upon the evidence, makes the following

Findings of Fact.

I.

The plaintiff, William Scott Norris, is a citizen of the United States and a resident of the State of Virginia and was duly appointed an inspector of customs in the port of Baltimore on July 2, 1907, at a compensation of $4 per diem for every day in the year. He continued under the aforesaid appointment to and including the 20th day of February, 1913. On that day he was summarily discharged from the service of the United States by the collector of customs of the port of Baltimore pursuant to instructions issued by the Secretary of the Treasury.

At the time of his discharge from said service he was in the

classified civil service of the United States. Before and at the time of his discharge aforesaid charges had been preferred against him by a committee appointed by the Secretary of the Treasury to
9 examine into and report upon the conduct of customs business at Baltimore. The said William Scott Norris was not furnished with a copy thereof, nor was he allowed a reasonable time for personally answering the same in writing.

II.

On March 5, 1914, plaintiff was restored to the said office pursuant to the direction of the Secretary of the Treasury. He was then immediately suspended from pay and duty upon the authority of the Assistant Secretary of the Treasury, and charges were preferred against him, and he was furnished with a copy of the charges and was allowed three days for personally answering them in writing, which he did. On April 25, 1914, the Assistant Secretary of the Treasury directed his removal from the service, and in pursuance of that direction he was removed on April 29, 1914.

III.

There has been no evidence taken in this case to show either the willingness or the ability of the plaintiff to perform the duties of the office of inspector of customs from the date of his removal from the service on April 29, 1914. It does not appear that he made any report in person or in writing to the office of the collector of customs in Baltimore.

The plaintiff is the sole owner of this claim, and no assignment or transfer of the same, or any part thereof or interest therein has been made.

10 Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the petition herein should be and the same is hereby dismissed. Judgment is rendered in favor of the United States against the plaintiff for the cost of printing the record in this cause in the sum of twenty-eight dollars and seventy-one cents ($28.71) to be collected by the Clerk as provided by law.

VI. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the thirteenth day of May, A. D., 1918, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendants and do order, adjudge, and decree that William Scott Norris, as aforesaid, is not entitled to recover and shall not have and recover any sum in this action of and from the defendants, the United States; and that the claimant's petition be and it hereby is dismissed: And it is further ordered, adjudged, and decreed that the defendants, the United States, as aforesaid, shall have and recover

of and from the claimant, Wilson Scott Norris, as aforesaid, the sum of Twenty-eight Dollars and seventy-one cents ($28.71), the cost of printing the record in this cause in this court, to be collected by the Clerk as provided by law.

By THE COURT.

11 VII. *Proceedings Had After Entry of Judgment.*

On June 11, 1918, the claimant filed a motion for new trial and to remand the case to the general docket for the taking of testimony. On June 17, 1918, this motion was overruled by the court.

VIII. *Claimant's Application for and Allowance of an Appeal.*

Comes now the claimant and makes application for an appeal to the Supreme Court of the United States.

SPOOR & RUSSELL,
Attorneys of Record.

DUDLEY & MICHENER, *Counsel.*

Filed July 12, 1918.

Ordered: That the above appeal be allowed as prayed for.
July 16, 1918.

EDWARD K. CAMPBELL,
Chief Justice.

12 Court of Claims of the United States.

No. 33262.

WILSON SCOTT NORRIS
vs.
THE UNITED STATES.

I, Saml. A. Putman, Chief Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact and conclusion of law filed by the court; of the judgment of the court; of the application of the claimant for, and the allowance of an appeal to the Supreme Court of the United States.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 16th day of July, A. D. 1918.

[Seal Court of Claims.]

SAML. A. PUTMAN,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 26,651. Court of Claims. Term No. 565. Wilson Scott Norris, Appellant, vs. The United States. Filed July 18th, 1918. File No. 26,651.

J. Bradley Tanner,
Chief Clerk.

Fred C. Kleinschmidt,
Assistant Clerk.

Office of the Clerk,
United States Court of Claims,
Washington, D. C.

March 25, 1920.

Supreme Court of the United States, October Term, 1920.

No. 48.

WILSON SCOTT NORRIS, Appellant,

vs.

THE UNITED STATES.

Hon. James D. Maher,
Clerk Supreme Court of the United States.

DEAR SIR:

Pursuant to the order of the Supreme Court of June 2, 1919 I am sending you herewith certified copy of the additional findings of fact and Per curiam Memorandum, entered by this court March 8, 1920, with the request that same be embodied in the record on appeal from this court in the above-entitled cause.

Respectfully,

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Court of Claims of the United States.

No. 33262.

WILSON SCOTT NORRIS

v.

THE UNITED STATES.

(Additional Findings of Fact. Announced March 8, 1920.)

This case having been remanded by the Supreme Court of the United States, by an order dated June 2, 1919, for additional findings of fact, the Court of Claims, upon the evidence in said cause, makes the following

Additional Findings of Fact.

The following finding, marked II, is additional to and in amplification of the original Finding II.

II.

The Secretary of the Treasury, having some time prior to August 24, 1911, appointed a committee to examine into, and report upon, the conduct of the customs business at Baltimore, and having instructed that the examination be thorough, vigorous, and exact, embracing the entire customs business, including the personnel, that committee made a report, under date of August 24, 1911, in which it made recommendations relative to the discharge from the service of a number of employees, and reported, among others, as to the plaintiff herein, as follows:

"W. Scott Norris, inspector, is sixty-four years old, and is not a good inspector (see p. 92); he has been suspended and reprimanded several times, and he suffers with rheumatism continually. In our opinion, the inspectors' force would be improved if he were dropped from the rolls."

On February 5, 1913, the Honorable Franklin McVeagh, Secretary of the Treasury, made a memorandum upon, or attached to, said report, in which he stated that he had given most careful consideration to it, and, after conference with the collector and the special agent in charge at Baltimore, and with members of the customs committee, he had reached the conclusions which were indicated after each of the names referred to in the committee's report; and as to the plaintiff, the memorandum stated:

"The committee recommends that he be dropped from the rolls. Recommendation approved."

Thereupon, on February 19, 1913, the Secretary of the Treasury addressed a communication to the collector of customs at Baltimore, in which he said:

"In view of recommendations received by the Department the following changes in the force employed at your port are hereby approved, the appointments to take effect from the dates of new oaths. * * *

"W. Scott Norris, inspector, Class 2, at $4.00 per diem, to be removed from the service, to take effect upon receipt of this communication, it appearing that he is not a good inspector, that he has been suspended and reprimanded several times, and that he suffers with rheumatism continually."

Upon receipt of that letter the collector at Baltimore, under date of February 20, 1913, addressed a letter to the plaintiff to the effect that he was directed by the Secretary of the Treasury to advise plaintiff that his services as inspector would be dispensed with, and the position vacated by him at the close of business on that day.

Nothing is shown as to what plaintiff did upon receipt of that notice until December 22, 1913, on which day he addressed a communication, from a place called High Peak, Va., to the Secretary of the Treasury, in which he stated:

"On Feby. 20th last, I was dismissed from the Customs Service at the port of Baltimore, in which service I held a position of inspector.

"No reason was assigned for my dismissal, nor were any charges furnished me, nor opportunity to answer given, as provided in section 6, of the postal appropriation act of August 24, 1912.

"My dismissal, therefore, seems contrary to law, and I, therefore, petition you to reinstate me and determine my case on its merits, in the manner prescribed in the above-entitled act."

On January 12, 1914, the department, by the Assistant Secretary, responded to this letter of December 22, and stated to plaintiff that his separation from the service had been directed, after careful consideration of his record in the department, and added:

"As it appears that you were removed without having been furnished with a written copy of the charges, the department is willing to request the Civil Service Commission for the issuance of a certificate to cover your reinstatement, and upon receipt of the same, to approve such reinstatement, and then give you a written copy of the charges which led to your separation from the service, as was done in a similar case at the port of Baltimore.

"As you have a legal right to a hearing in the matter, if you insist upon such legal right, the department will follow the course indicated in relation to your reinstatement."

Thereafter, on January 24, 1914, the plaintiff wrote the Secretary of the Treasury, acknowledging receipt of the department's letter of the 12th instant, and said:

"Replying, beg to state that I desire to renew the request for reinstatement, as contained in my letter of the 22d ultimo."

"On February 10, 1914, a communication was addressed by the chief of the division of customs at Baltimore to the Chief of the Division of Appointments of the Treasury Department, requesting the reinstatement of W. Scott Norris as inspector, class 2, $4 per diem, in the Custom Service at Baltimore, in order that he might be

furnished with a copy of the charges upon which he had been removed, and be allowed to answer the same in accordance with the act of August 24, 1912.

On the same day, February 10, 1914, the Treasury Department, by the Assistant Secretary, addressed a communication to the collector of customs at Baltimore, Md., inclosing therein a letter reinstating the plaintiff as inspector, class 2, and adding:

"Immediately upon Mr. Norris subscribing to the oath of office he will be suspended from duty and pay pending investigation of charges of inefficiency to be preferred against him based upon the report of a committee of special agents which investigated the Customs Service" at Baltimore in 1911, and including the part of said report referring to plaintiff as above quoted.

On February 12, 1914, the Treasury Department requested the Civil Service Commission to issue the necessary certificate for the reinstatement of W. Scott Norris as inspector of customs, class 2, at $4 per diem, in the Customs service at Baltimore, Md., stating that the department desired the reinstatement in order to give Mr. Norris an opportunity to answer the charges against him which resulted in his removal from the service in February, 1913.

On February 16, 1914, the Civil Service Commission issued the order above requested "in order that he may be given an opportunity to answer the charges against him."

On February 20, 1914, the collector of customs at Baltimore, was notified that by direction of the Secretary of the Treasury:

"W. Scott Norris is hereby reinstated and appointed inspector, class 2, new office, with compensation at the rate of $4 per diem (at Baltimore) in order that he may have an opportunity to answer the charges against him, which resulted in his removal, * * * the appointment to take effect from date of oath."

The plaintiff executed the oath of office on March 5, 1914, of which fact the Secretary of the Treasury was notified by the collector on that date.

On March 9, 1914, the plaintiff made and filed with the collector of customs an extended answer "to the charges contained in department letter, dated February 10th, and submitted by you to me under date of March 5th."

Immediately upon the execution of the oath of office on March 5, the plaintiff was suspended from duty and pay, the charges were preferred against him, and his answer to the charges were forwarded to the Secretary of the Treasury by the collector on March 10, 1914.

On April 25, 1914, the Treasury Department, in a letter signed by the Assistant Secretary, acknowledged receipt of plaintiff's answer to the said charges and considers the answer. The letter concludes:

"In view of the foregoing, after a careful consideration of the charges and the evidence upon which they were based, the department is of the opinion that they were not sufficient to have warranted a dismissal of this officer. Inasmuch, however, as there is no vacancy to be filled at the present time in the force of inspectors at your port, the department can not utilize Mr. Norris' services. The position of inspector was created for him in order that he might take

the oath of office so that these charges could be tried. His services will therefore necessarily be dispensed with, which will be effective upon receipt of this letter by you, and the position abolished. He is eligible for reinstatement within one year, provided his services can be utilized and he is properly recommended for an existing vacancy."

II-A.

The plaintiff's motion for additional findings calls for a finding "whether or not Wilson Scott Norris made, or caused to be made, applications for reinstatement following his second removal, under dates of May 27, 1914, and February 18, 1915."

In answer to that interrogatory, the court finds, from the evidence, the following facts:

Under date of May 27, 1914, a letter was addressed by the president of the National Association of United States Customs Inspectors to the Assistant Secretary of the Treasury, calling attention to the letter above mentioned, of April 25, from the secretary to the collector, and in this letter the president of the association urged the reinstatement of the plaintiff upon the grounds that he had been wrongfully removed, and that the department had concluded that the charges were not sufficient to have justified the removal at the earlier date above mentioned, and stating in his letter: "The sole question then is whether or not the department may find a place for him." The letter urged favorable action toward the reinstatement of the plaintiff.

On June 6, 1914, the Assistant Secretary of the Treasury responded to this letter from the president of the association, to the effect that there was no position of inspector vacant at the port of Baltimore, and the department could not, therefore, utilize the services of plaintiff, and that Mr. Norris was entitled to reinstatement, and should a vacancy occur in which his services could be utilized he would be given consideration.

On February 18, 1915, the plaintiff addressed a letter to the Secretary of the Treasury making application for reinstatement to the position of inspector of customs. Except the letter of May 27, 1914, from the president of the association it does not appear that the plaintiff applied, on that date, or that application was caused to be made by him on that date, for reinstatement.

II-B.

From the testimony taken since the cause was remanded the court finds that the plaintiff, after his dismissal, remained a few months in Baltimore, and then went to a farm in Virginia; that he occasionally visited Baltimore; that he was ready, willing, and able to discharge the duties of customs inspector at the port of Baltimore from the time of his dismissal up to, and including the 20th day of May, 1916, and no facts appear to show that he was not ready, willing, and able to perform the duties at the time of taking his deposition in August, 1919.

The foregoing (Finding II-B) takes the place of the original Finding III.

The plaintiff is the sole owner of this claim, and no assignment or transfer of the same, or any part thereof, has been made.

Memorandum.

Per Curiam:

From the judgment of the Court of Claims in this case, an appeal was taken to the Supreme Court of the United States. The appellant there, who was the plaintiff here, filed a motion to remand the record, with instructions to the Court of Claims to take evidence, by deposition or otherwise, and to certify therefrom the facts therein upon certain points set forth in the motion. The order of the Supreme Court upon that motion is that on consideration of the motion of the appellant to remand this cause to the Court of Claims for further finding of facts, it is ordered that the said motion be, and the same is hereby, granted.

Since that order the plaintiff has taken depositions to prove that he has been ready, willing, and able to discharge the duties of the office from which he was removed. Additional findings of fact have been made.

It has been a long continued practice in the Court of Claims that admissions of fact by a representative of the defendant, made at the bar in course of trial, will not be accepted by the court in the absence of evidence in the record, unless such admissions be by the Attorney General, or his authorized assistant, and in writing.

The reasons for this practice have been stated in decisions. Manifestly, besides other reasons, the court can not be expected to carry such admissions in mind, or subject itself to the criticism of making findings that there is nothing in the record to sustain.

In its attempt to enforce this practice there has now been adopted a Rule of Court which specifically provides that a stipulation shall be in writing, duly signed by designated representatives of the Government, and that otherwise the court will not pay attention to stipulations of attorneys.

This court is in doubt as to whether the order of the Supreme Court is intended as a direction that it shall proceed as upon a new trial. We construe the order as remanding the cause "for further finding of facts."

In another case (Nicholas v. United States, No. 168) in the Supreme Court, an order was made upon a motion to remand the cause for further findings of fact. The motion was granted "and the Court of Claims is directed to set aside its judgment and reopen the case."

In the absence of an order directly setting aside the judgment from which the appeal was prosecuted, or directing this court to set it aside, it is our view that we can not set aside the judgment because of the time that has elapsed since its rendition, and, because further, the appeal removed the case from this court to the Supreme Court.

We therefore think that our jurisdiction in the matter is limited

to making findings of fact upon the points stated in the motion, and certifying the same. If the judgment were set aside we would have to treat the matter as upon a new trial; but in the present condition of the record, as we view it, the appeal is in the Supreme Court.

The clerk will be ordered to certify a copy of the additional findings and this memorandum to constitute a part of the record in the case.

BY THE COURT.

Filed Mch. 8, 1920.

A true copy:
Test this March 25, 1920.

[Seal Court of Claims.]

F. C. KLEINSCHMIDT,
Asst. Clerk Court of Claims.

[Endorsed:] File No. 26,651. Supreme Court U. S., October Term, 1920. Term No. 48. Wilson Scott Norris, Appellant, vs. The United States. Certified copy of additional findings of fact and per curiam opinion of the Court of Claims. Filed March 27, 1920.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1918. No. [redacted]11

WILSON SCOTT NORRIS,

Appellant,

vs.

THE UNITED STATES.

Appeal from the Court of Claims.

Motion and

BRIEF IN SUPPORT OF APPELLANT'S MOTION FOR REMANDING OF RECORD.

WILLIAM E. RUSSELL,
LOUIS T. MICHENER,
PERRY G. MICHENER,
Attorneys for Appellant.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

WILSON SCOTT NORRIS, Appellant, vs. THE UNITED STATES.	No. 565.

APPEAL FROM THE COURT OF CLAIMS.

Appellant's Motion for Remanding of Record.

Brief in Support of Motion.

Now comes the appellant and moves the Court to remand the record in this case to the Court of Claims, with instructions to that Court to take evidence by deposition or otherwise, and to certify therefrom the facts bearing upon the following points:

1. Whether or not the charges mentioned in Finding II (R. 5) were held to be sufficient to have warranted the removal of Wilson Scott Norris on February 20, 1913.

2. Whether or not Wilson Scott Norris made, or caused to be made applications for reinstatement following his second removal, under dates of May 27, 1914, and February 18, 1915.

3. Whether or not Wilson Scott Norris stood ready, willing and able to perform the duties of his office as inspector of customs during all the time covered by this action.

Appellant shows to the Court that there was no contradictory or conflicting evidence in the Court of Claims on the above points.

With reference to the first point above mentioned, appellant shows that the charges preferred against him on his restoration to office on March 5, 1914, were not sustained when the opportunity was afforded him at that late date of answering same. The evidence in the court below on this point consisted of a letter written by the Treasury Department to the Collector of Customs at Baltimore as follows:

"Treasury Department,
Washington, April 25, 1914.

Collector of Customs,
Baltimore, Md.

Sir: The department is in receipt of your letter of the 10th ultimo transmitting the answer of W. Scott Norris, inspector, Class 2, of your port, in response to charges preferred against him under the department's instructions of February 10, last.

Mr. Norris was dismissed from the service without trial in accordance with the civil service rules and regulations upon a recommendation made by a committee of special agents that examined your port in 1911, the charge preferred against this officer being as follows:

'W. Scott Norris, inspector, is 64 years old, and is not a good inspector; he has been sus-

pended and reprimanded several times, and he suffers with rheumatism continually.'

The fact that Mr. Norris may have reached the age of 64 is not an element in considering whether he should be retained as an inspector, unless, by reason of his age, he has become physically incapacitated from performing the duties of his position. It appears that Mr. Norris was suspended in January, 1908, for five days for neglecting to notify district officers at points of destination of the intended arrival of scows containing imported merchandise and that he neglected to send proper papers with such scows; that he was suspended in January, 1911, for five days for failure to obtain the proper numbers of cars loaded with ferromanganese; that on November 5, 1908, he was reprimanded for an error in his returns of unlading, and on January 18, 1909, again reprimanded for a similar error; that on July 3, 1909, he was reprimanded for sending forward a scow manifest without giving the marks and numbers in detail of each bale of burlap contained thereon; that on January 13, 1910, he was cautioned for an incorrect delivery of corkwood to an importer, instead of sending same to general order; that on February 5, 1910, he was cautioned for failing to notify the office of bad-order condition of certain liquors; and that on July 7, 1910, his attention was called to an error on an I. T. shipment due to a confusion of marks.

As all these transactions were disposed of by what was deemed the proper action in each case, the department is of the opinion that they should not be considered except in connection with a trial of Mr. Norris for some dereliction of duty in arriving at a decision as to the proper punishment to be imposed. They will, therefore, not be further considered in the present case.

With respect to the charge that this officer suffered from sciatic rheumatism continually, it

appears that he had taken only 20 days' sick leave in 10 years, and he submits that what little rheumatism he has suffered with was brought about by exposure in the performance of official duties in connection with the discharge of vessels at night. He also submits a certificate from his physician, in which it is stated that while he has treated Mr. Norris on several occasions for sciatic rheumatism, this ailment was not at all chronic, and that he was not at any time incapacitated for a period of longer than three or four days, and that he is now physically able to perform a day's labor.

In view of the foregoing, after a careful consideration of the charges and the evidence upon which they were based, the department is of the opinion that they were not sufficient to have warranted a dismissal of this officer. Inasmuch, however, as there is no vacancy to be filled at the present time in the force of inspectors at your port, the department cannot utilize Mr. Norris's services. The position of inspector was created for him in order that he might take the oath of office so that these charges could be tried. His services will, therefore, necessarily be dispensed with, which will be effective upon receipt of this letter by you, and the position abolished. He is eligible for reinstatement within one year, provided his services can be utilized, and he is properly recommended for an existing vacancy.

Respectfully,

(Signed) WILLIAM P. MALBURN,
No inclosures Assistant Secretary."

There was no conflicting or contradictory evidence in the record below with reference to the contents of the foregoing letter. This letter was put in evidence by appellant to support the averment in paragraph V of the petition (R. 2, top of page). Appellant duly requested the Court below to find as a fact that the

charges had not been sustained. This request was contained in Claimant's Requests for Findings of Facts, No. V, in the following language:

> "Claimant duly submitted his answer to the charges, and after due consideration thereof the Assistant Secretary of the Treasury on April 25th, 1914, advised the Collector of Customs of the Port of Baltimore by letter that the charges had not been sustained and that claimant should not have been removed."

The Court below failed or refused to find the foregoing but did find that appellant was again removed, Finding II, (R. 5). Appellant submits that it is most important that this Court be advised as to whether or not the charges were sustained. As the record stands, Finding II, (R. 5), the inference is irresistible that appellant was found guilty of the charges. Justice calls for an answer on this request, because the fact is that appellant was acquitted of the charges.

As to the second point, appellant shows that, following his second removal on April 29, 1914, at least two written requests were made for his reinstatement. The evidence in the court below consisted of letters addressed to the Secretary of the Treasury and dated May 27, 1914, and February 18, 1915, respectively. These letters were part of the record and were not contradicted. The Court below certified to this Court, Finding III, (R. 5), that there was no evidence to show the willingness or the ability of appellant to perform the duties of his office after the aforesaid second removal. The letters herein referred to are directly at variance with Finding III. Proper averment of these requests for reinstatement was made in the petition, paragraph V, (R. 2), and a request for such a finding was duly made in the Court below, the evidence supporting such request having theretofore been taken.

Concerning the third point, appellant shows that the petition alleges in paragraph 7th thereof (R. 2):

> "During all the time from the date of claimant's removal on February 20, 1913, as heretofore alleged, claimant has stood ready, willing and able to perform the duties of the office to which he was legally appointed, and from which he was illegally separated. Claimant avers that he has been prevented from performing the duties of said office by direction of the Secretary of the Treasury, or his subordinates."

The petition was filed in the Court of Claims on May 23, 1916 (R. 1) and thereafter various departmental reports were filed constituting the evidence in the case. Under date of March 30, 1917, appellant, by his counsel, caused to be prepared a motion to be filed in the Court of Claims containing a stipulation in writing, which said motion was for the purpose of taking the testimony of the claimant in answer to certain written interrogatories, one of them reading as follows:

> "Since the 20th day of February, 1913, the date of your removal, have you or not, at all times stood ready, willing and able to perform the duties of the office of inspector of customs?"

The stipulation mentioned above, to which was annexed the interrogatories, was presented for approval to the attorney of the United States representing the defense in this case, for his approval and signature. The attorney for the United States read the stipulation and interrogatories and then and there stated that he would not agree to approve or sign even as to the question whether or not the claimant stood ready, willing and able to perform the duties of his office. The attorney for the Government gave as his reasons therefor that he did not wish to encumber the record.

and he argued that the record showed persistent attempts on the part of the claimant to effect his reinstatement, thereby showing in a most conclusive way his readiness and willingness to serve. Counsel for claimant contended to the attorney for the Government that the Court might ask why claimant had not proven affirmatively his readiness, willingness and ability to perform the duties of his office. The Government's attorney replied that if the Court did that he would rise and say that there was sufficient proof in the record and that the Government conceded as a fact, that claimant was ready, willing and able to perform the duties of the office. Relying upon this statement of the defense, appellant did not press the motion for the taking of testimony on this point.

This case, together with two other cases, involving the same law questions, were argued together before the Court of Claims on March 6, 1918. It was agreed between counsel on both sides and the Court that the argument of the law questions involved in the three cases should be made in this case, but with the understanding that the said argument should apply to the other two cases. On the 5th day of March, 1918, counsel for appellant called to the attention of the attorney for the Government that he had objected to claimant's request for Finding VII heretofore set forth. The objection in the brief of the Government to this finding was as follows:

> "Objected to because not supported by the evidence. It is conceded that there is a very strong inference that plaintiff stood ready, willing and able to perform, but there is no competent evidence of this fact."

Counsel for appellant thereupon brought to the attention of the attorney for the Government the oral agreement heretofore mentioned as having been made on March 30th, 1917. The Government's attorney

then stated that he regretted having made the objection, and in explanation thereof further stated that the conversation mentioned had passed out of his mind temporarily, but he then recalled it and said that on the argument the next day, in open court, he would express his regret to the Court and for the benefit of the record would concede that the claimant stood ready, willing and able to perform the duties of his office. When this case was called for argument the following day the Government's attorney arose and informed the Court of the oral agreement of March 30, 1917, and then and there stated for the benefit of the record:

> "That the Government conceded that the claimant would have testified in answer to a written interrogatory that 'he was ready, willing and able at all times to perform the duties of his office.' "

This case was thereupon argued upon the various questions involved, the Court below making no comment on, or objection to this concession on the part of the Government.

Appellant's petition was dismissed for the reason, as it appears in Finding III (R. 5), that there was no evidence to show the willingness or the ability of appellant to perform the duties of his office.

Since his removal appellant has stood ready, willing and able at all times to perform the duties of his office and would have so testified in answer to the interrogatory heretofore mentioned and will so testify if given an opportunity by this Court.

Appellant further shows to the Court that on June 11, 1918, claimant filed a motion in the court below for a new trial (R. 6) and for a remanding of the case to the General Docket for the taking of testimony. The Court below overruled this motion on June 17, 1918. In this motion for a new trial ap-

pellant caused to be submitted the affidavits of himself, of his counsel, Louis T. Michener, and of his attorney of record, William E. Russell. These affidavits set forth in detail the oral agreement made with the attorney for the Government with reference to the question concerning appellant's readiness, willingness and ability to perform the duties of his office. The attorney for the United States filed a statement in reply to the aforesaid motion admitting therein that on the argument of the case he had made the concession heretofore set forth. Nevertheless, the motion was denied. Had the motion been allowed evidence would have been taken and it would have been proven that claimant stood ready, willing and able to perform the duties of his office.

WILSON SCOTT NORRIS,

Appellant.

Wm. E. Russell,
Louis T. Michener,
Perry G. Michener,
Attorneys for Appellant.

State of Virginia, }
County of Floyd, } ss:

Personally appeared before me, a notary public in and for the County of Floyd, Wilson Scott Norris, who, being duly sworn according to law, deposes and says: That he is the appellant in the above-entitled case; that he has read the foregoing motion and understands its contents, and that the matters and things therein stated are true in substance and in fact as he is informed and verily believes.

WILSON SCOTT NORRIS.

Subscribed and sworn to before me
this 22 day of April, 1919.
D. S. Lucas,
Notary Public.
My commission expires Jan. 14, 1922.
(Seal.)

Appellant's Brief on Motion to Remand Record.

Nature of Action.

This action is to recover the salary due Wilson Scott Norris as inspector of customs in the Port of Baltimore, at the rate of $4 per diem from February 20, 1913, to and including September 30, 1917. Appellant was appointed inspector on the 2nd day of July, 1907. He continued under this appointment to the 20th day of February, 1913. On this latter date he was summarily and arbitrarily removed without charges and in violation of the rules of the Civil Service Commission, the Customs Laws and Regulations and the Act of Congress of August 24, 1912, (37 Stat. 555).

No charges were furnished appellant, nor was he allowed a reasonable time for personally answering same in writing (R. 4, 5).

On March 5, 1914, appellant was restored to his office by the Secretary of the Treasury, but was immediately suspended and charges in writing handed him, and he was allowed three days to make answer thereto in writing. Appellant submitted his written answer to the charges within the three days, and thereafter and on the 25th day of April, 1914, the Assistant Secretary of the Treasury directed that appellant should be removed from the service. This second dismissal was accomplished, pursuant to the aforesaid order of the Assistant Secretary of the Treasury, on April 29, 1914.

Argument.

I.

Appellant's first removal on February 20, 1913, was an absolute nullity, being unlawful, invalid and of no force and effect because it was contrary to the Civil Service Rules, the Customs Laws and Regulations and the Acts of Congress. Civil Service Rule No. XII, Section 2, as amended by executive order of February 8, 1912, was in effect at the time of this first removal. We set forth in part the aforesaid rule:

> "A person in the competitive service whose removal is proposed, shall be furnished with a statement of reasons and be allowed a reasonable time for personally answering such reasons in writing * * *"

This rule was promulgated in the Treasury Department by T. D. No. 32,265 on February 12, 1912.

The Customs Laws and Regulations of 1908 were also in effect on the aforesaid date. Article 1385 of said regulations provides in part, as follows:

> "No removal shall be made from any position subject to competitive examination except for just cause and upon written charges filed with the head of the department or with another appointing officer, of which the accused shall have full notice and an opportunity to make defense."

Article 1386 of the aforesaid regulations provides in part as follows:

> "At the same time a complete copy of the charges and specifications will be furnished to the accused, with the information that such defense as is desired to be made in the premises must be submitted to the supervising officer for transmission to the Secretary of the Treasury within three days from date of receipt of the copy of the written charges."

There was also in effect at the time of his removal the Act of August 24, 1912, 37 Stat. 555, in part as follows:

> "Section 6. That no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service, and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing, and affidavits in support thereof; * * *"

There was no attempt made by the Treasury Department to comply with any of the foregoing requirements and appellant was arbitrarily, unlawfully and without notice removed from his office. *United States v. Wickersham*, 201 U. S. 390; *United States, ex rel. Newcomer v. Postmaster*, 221 Fed. 687.

II.

Appellant's second removal was also invalid. In the first place appellant, having been acquitted of the charges, was entitled to restoration of his office. In the second place, *his second removal was invalid because the Assistant Secretary of the Treasury has no power of removal.* Only the appointing power has the power to remove, and it appears in this case that the second removal was not even ordered by the *appointing power*, viz: *The Secretary of the Treasury*, but was made pursuant to an order issued by the Assistant Secretary of the Treasury. A suspension from duty and pay or removal can only be made by the appointing officer. *Lellman vs. United States*, 37 C.

Cls. 128; *Beuhring v. United States*, 45 C. Cls. 404; *Blake v. United States*, 103 U. S. 227; *Keim v. United States*, 177 U. S. 290. Subordinate customs officials are removable only by the Secretary of the Treasury. Art. 1385, Customs Laws and Regulations of 1908.

III.

As both the first and second removals were invalid, appellant was never lawfully removed, and it follows that he is entitled to the salary of his office. The authorities are numerous and harmonious on this point.

Fitzsimmons v. Brooklyn, 102 N. Y. 536.
United States v. Wickersham, 201 U. S. 390.
Garvey v. Lowell, 199 Mass. 47.
Tucker v. Boston, 223 *ib.* 478.
Andrews v. Portland, 79 Me. 484.
Everill v. Swan, 20 Utah 56.
Houston v. Estes, 35 Tex. Civ. App. 99.
State ex rel. Dennison v. St. Louis, 90 Mo. 19.
Leonard v. Terra Haute, 93 N. E. 872.
Seifen v. Racine, 129 Wis. 343.
People v. Stevenson, 272 Ill. 215.

The foregoing cases agree that the salary of an office is an incident thereof and that the legal title to the office carries the right of salary with it.

The Wickersham case, *supra*, was similar to the instant case as it involved a removal without charges. This Court held that the removal was a nullity and that Wickersham was entitled to the salary of his office during the period of removal.

IV.

We do not understand that the rule has ever been established that a public officer, who has been unlawfully removed must prove affirmatively that he was ready, willing and able to perform the duties of his office during the period of removal in order to recover the salary thereof. If the salary attaches to the office as an incident thereof, it would seem to follow that he who holds legal title thereto must be entitled to the salary. Therefore, readiness, willingness and ability are presumed, on the part of one who is an officer *"de jure."* There are many cases that hold that a claimant for the salary of an office, may still recover same even though he had other employment during the period of unlawful removal. In the Fitzsimmons case (*supra*), the claimant had other employment and received another salary during the time he was ousted from his office, but he was awarded the salary of his office on the ground that "the salary attached thereto as an incident thereof." The same conditions existed and the same rule was followed in

State ex rel. Chapman v. Walbridge, 153 Mo. 194.
Houston v. Estes (*supra*).
Everill v. Swan (*supra*).

V.

If, however, it should be deemed necessary that appellant prove his willingness, readiness and ability to perform the duties of his office as a condition of recovery, it is respectfully submitted that the concession made by the attorney for the Government, as heretofore alleged, was competent evidence and sustained the averments of paragraph 7th of the petition heretofore set forth. Appellant feels that he has been aggrieved by the action of the Court below in dismissing the petition when counsel for the Government made the concession as set forth herein, and for the further reason that the Court below failed to certify that appellant was acquitted of the charges. Therefore, appellant submits if this Court deems this point material, that this case should be remanded to the Court below with instructions to take evidence on the point, and certify the facts to this Court. We submit and state to the Court that there was no conflicting evidence in the Court below, and that the findings are incomplete and inconclusive. We submit that these deficiencies in the findings can be remedied and justice done to both parties hereto by remanding the record to the Court below, with instructions to find and certify as requested by the motion.

Certificate.

We, as appellant's counsel, hereby certify that in our opinion this motion for a remanding of the record is well founded in law, is in the interest of justice, and is not interposed for the purposes of delay.

WILLIAM E. RUSSELL,
LOUIS T. MICHENER,
PERRY G. MICHENER,
Attorneys for Appellant.

No. [redacted]11

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

WILSON SCOTT NORRIS, APPELLANT,

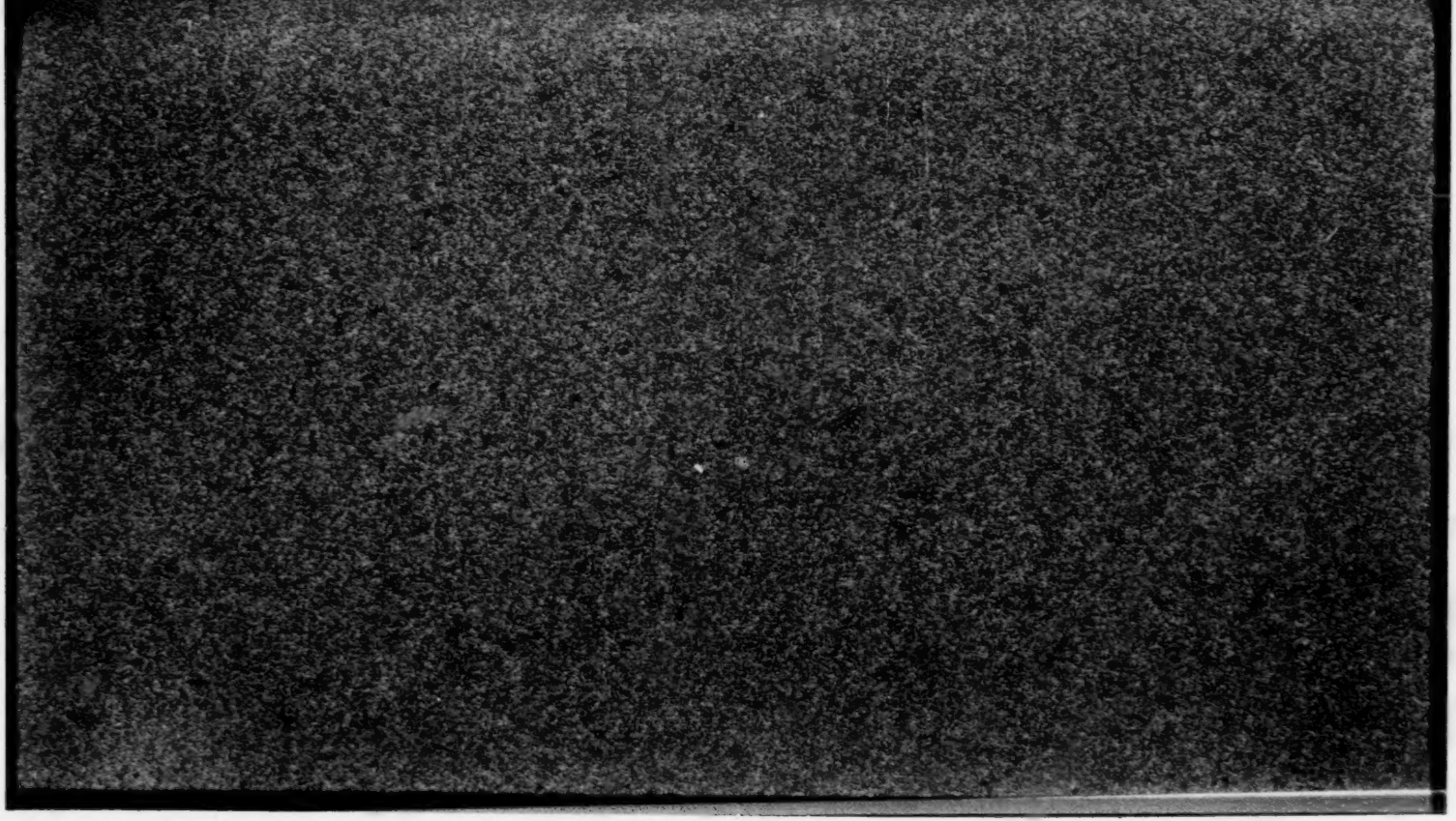
v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1921



In the Supreme Court of the United States.

OCTOBER TERM, 1920.

WILSON SCOTT NORRIS, APPELLANT,
v.
THE UNITED STATES. } No. 48.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Claimant filed this suit in the Court of Claims on February 23, 1916, to recover a $4 per diem salary as an inspector of customs at Baltimore from February 20, 1913, on which day he was discharged by direction of the Secretary of the Treasury, until May 20, 1916. (Rec. p. 2.) By an amended petition he sought to recover at the rate of $4 per day until September 30, 1917. (Rec. p. 3.) The Court of Claims dismissed his petition May 13, 1918. On appeal to this court a motion to remand for additional findings was made and sustained. The additional findings are now before the court.

Prior to August 24, 1911, the Secretary of the Treasury appointed a committee to examine into the customs business at Baltimore, including the personnel. This committee, on that day, made a report that appellant was 64 years old, and was not

a good inspector; that he had been suspended and reprimanded several times and suffered with rheumatism, and that in their opinion he should be dropped from the rolls. The Secretary of the Treasury approved this recommendation, and on February 19, 1913, directed the collector of customs as follows:

> W. Scott Norris, inspector, class 2, at $4 per diem, to be removed from the service, to take effect upon receipt of this communication, it appearing that he is not a good inspector, etc.

On February 20, 1913, the collector at Baltimore notified appellant that, by direction of the Secretary of the Treasury, his services as inspector were dispensed with and his position would be vacated on that day. Charges were not served on him, nor was he given an opportunity to answer.

After a delayed protest, the Assistant Secretary of the Treasury notified him that since he had been removed without receiving a written copy of the charges, if he so desired, the Treasury Department would reinstate him for the purpose of giving him a copy thereof. Appellant insisted that he be given the right to have charges preferred against him. The chief of the division of customs at Baltimore requested the Chief of Division of Appointments of the Treasury to reinstate appellant as a customs inspector so that he could be served with charges. On February 10, 1914, the Assistant Secretary by letter ordered

the reinstatement of appellant and directed that immediately upon taking the oath of office he was to be suspended from pay and duty and that charges were to be preferred against him, according to the recommendation of the committee above mentioned. The Civil Service Commission, at the request of the Treasury Department, issued the necessary certificate, and on February 20, 1914 appellant was "reinstated and appointed" a customs inspector at $4 per diem and was immediately suspended. On March 9, 1914, he answered the charges. The Assistant Secretary on April 25, 1914, in a letter to the collector replied to the answer, stating that the charges were not sufficient to have warranted dismissal of the officer, but stated further:

> Inasmuch, however, as there is no vacancy to be filled at the present time in the force of inspectors at your port, the department can not utilize Mr. Norris's services. The position of inspector was *created* for him in order that he might take the oath of office so that the charges could be tried. His services will therefore necessarily be dispensed with, which will be effective upon receipt of this letter by you, and the position *abolished*. He is eligible for reinstatement within one year, provided his services can be utilized, etc.

On June 6, 1914, as shown by the findings, there was no vacancy in the office of inspectors at the port of Baltimore. On February 18, 1915, plaintiff

again asked to be reinstated, but the findings do not show the reply of the Treasury Department.

Appellant was ready, willing, and able to perform the duties of customs inspector at Baltimore from the time of his dismissal.

CONTENTIONS.

The appellant's contentions are as follows:

First. That his removal from the service on February 20, 1913, was unlawful, and

Second. That his second removal on April 29, 1914, was unlawful because (*a*) he was acquitted of the charges brought against him, and (*b*) the officer directing the removal acted beyond the scope of his authority.

In answer to these contentions, the United States maintains:

First. That the Court of Claims has no jurisdiction in the premises.

If it has, the action is barred by laches.

Third. That, with reference to his second removal, (*a*) the removal was legally made by an officer who had authority to do so; (*b*) that, even though the appellant was unlawfully removed, yet he is not entitled to draw the salary because his place was filled by another who drew the salary during the period for which the appellant makes claim, and his office was abolished.

ARGUMENT.

I.

It does not appear that the Court of Claims has jurisdiction to give judgment for the salary of an office where the primary issue is the title to the office.

The Court of Claims is a court of limited jurisdiction, and the question is presented now whether the case at bar comes within the jurisdiction granted by Congress. Appellant comes into court expressly stating that he has no contract, express or implied, with the Government, but claims the salary of a Federal office as a right, on the theory that the salary is incidental to the office. The only question then to be decided, and the only issue, is the title to the office. To assume, for the purposes of the suit, that he is the *de jure* officer begs the whole question, for it is the only question calling for a decision. Has the Court of Claims jurisdiction in such case?

In a recent case (*United States* v. *The Holland-American Line*, decided Dec. 6, 1920) this court has had occasion to review the jurisdiction conferred on the Court of Claims by the Tucker Act (sec. 145, Judicial Code) and to comment on previous cases construing the extent of the jurisdiction conferred. Jurisdiction was denied for the reason that the claim presented sounded in tort.

The sole complaint in the present case is that the Secretary of the Treasury did not comply with the act of August 24, 1912, which provides a certain procedure where an officer is removed.

Where a public officer having the power of removal discharges or removes another wrongfully it is a tort. *McGraw* v. *Gresser* (1919) 226 N. Y. 57; *People ex rel. Walker* v. *Ahearn* (1910) 123 N. Y. Supp. 845.

That a public officer does not hold office or become entitled to its emoluments by virtue of any contract with the Government is sustained by the cases cited by appellant in his brief, page 16. The doctrine is the outgrowth of the principle enunciated by this court in construing the contract clause of the Constitution. *Butler* v. *Pennsylvania*, 10 How. 402. Consequently it is not a claim based on a contract express or implied.

This is not a claim arising under the Constitution. *Crenshaw* v. *United States*, 134 U. S. 99–104; *Burnap* v. *United States*, 252 U. S. 512.

By the process of elimination, the only possibility upon which jurisdiction can be predicated in this case is a "claim" founded upon a "law of Congress." The only law of Congress involved is the act of August 24, 1912, which provides that "the person whose removal is sought shall have notice of the same (the reasons for his removal) and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same." But this act creates no claim. It does not purport to create a liability on the part of the Government, where one of its officers fails to comply with it.

Where jurisdiction is predicated on a law of Congress there must be some liability to pay somewhere, either contractual or otherwise. This contention is illustrated in the case of *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645–656, where it is said:

> *The law will imply a promise* to make the required compensation, where property to which the Government asserts no title is taken, *pursuant to an act of Congress.*

In the recent case of *Great Western Serum Company* v. *The United States* (decided December 6, 1920), Mr. Justice McReynolds said:

> There was no purchase of the destroyed articles or agreement therefor—none is claimed—and we think it quite clear that no contractual obligation by the United States to pay for them can be implied from the act itself.

The invasion of rights guaranteed either by the Constitution or the laws of Congress does not confer jurisdiction on the Court of Claims where no contract to pay can be implied. In the *Schillinger case*, 155 U. S. 163, Schillinger was guaranteed by a patent issued under the laws of Congress the exclusive right to manufacture, use, and sell the patented article. Nevertheless, Government officers appropriated his patent for the use of the Government. Jurisdiction was denied on the ground that the infringement was tortious. In the *Basso case*, 239 U. S. 602, Basso contended that

he had been deprived of his liberty without due process of law contrary to the rights guaranteed him by the Constitution. Jurisdiction was denied on the ground that if he had a claim it sounded in tort. All that can be said for the present case is that appellant had a right to remain in office until removed by a certain procedure. When he was removed, his rights were invaded by the officer who removed him, but no claim arose under any law of Congress. In other words, the foundation of his claim is the alleged unlawful act of the Secretary of the Treasury.

This discussion leads to the question of remedy in a case of this kind. This statute (act of Aug. 24, 1912) is the outgrowth of the common law, which is stated by High as follows (Extraordinary Legal Remedies, 3d Ed., sec. 68):

> The general common-law rule that to warrant the removal of an officer specific charges should be brought against him, and all witnesses in the matter should be sworn, is held applicable even to offices unknown to the common law and created by statute, and the disregard of this rule in the amotion of an officer may authorize the aid of mandamus to compel his restoration.

In *Sawyers case*, 124 U. S. 200–212, Mr. Justice Gray said:

> The jurisdiction to determine the title to a public office belongs exclusively to the courts of law, and is exercised either by *certiorari*, error or appeal, or by mandamus,

> prohibition, or information in the nature of a writ of *quo warranto*, according to the circumstances of the case and the mode of procedure established by common law or by statute.

This act of August 24, 1912, does not abrogate the rule that the power of appointment carries with it the power of removal. It simply provides a mode of procedure where the power is exercised. If that procedure is omitted or irregularly exercised, the amoted officer's duty is to appeal to a court having jurisdiction to review procedural matters. If the removing authority omits the prescribed procedure, it is a matter which affects his jurisdiction to act, so to speak, and it is a proper matter to be brought to the attention of a court having the power to bring the appointing power before it in order properly to inquire into the acts or omissions complained of. Basso (*Basso* v. *United States, supra*) complained that the court which deprived him of his liberty was without jurisdiction. So in this case the only complaint can be an attack on the jurisdiction of the Secretary of the Treasury in removing him. Where is there any grant of jurisdiction to the Court of Claims enabling it to review the acts of the Secretary of the Treasury?

An inspection of the cases relied on (p. 16) by appellant to show that he is entitled to the salary of the office as an incident thereof will show that in most cases the officer, by certiorari or otherwise, first established his title to the office. Apparent

exceptions, as the *Wickersham case,* 201 U. S. 390, in this court are grounded on another principle, namely, that an officer can not be removed by a subordinate officer who has neither the power of appointment nor removal. Mr. Justice Day carefully restricted the issue in that case by saying:

> Whether he could have been summarily removed or suspended by the President or other competent authority is not the question now before the court, but the question is whether the employee during his wrongful *suspension* by a subordinate officer is entitled to the compensation provided by law.

The present case is not one of suspension. It is an out-and-out removal by competent authority, and the question of whether or not the incumbent could be restored to office is a question to be determined by a court having the power to review the proceedings had at the time of his removal, and the power to compel his restoration in the event that the court should come to the conclusion that the officer was not removed in compliance with the procedure laid down by law.

Unless the title to the office is first tested by mandamus or other appropriate remedy by a court invested with jurisdiction to try title to an office, the situation is anomalous. An officer who is removed by the Secretary of the Treasury, the appointing authority, is no longer carried on the pay roll. He is not actually in office and performs none of the functions or duties of the office. Nor could he perform if he were so inclined. The moneys ap-

propriated by Congress for the payment of customs inspectors are paid to *de facto* officers or for other customs expenses. Nevertheless an inspector, unknown to the records of the Government, sues for the salary of such an office on the assumption that he is a *de jure* officer. If he should prevail, he would not be restored to the office. On the contrary, he would be in better position than if he were performing the duties of the office, for having been adjudicated for the purposes of a suit in the Court of Claims a *de jure* officer, he could continually sue for the salary of the office so long as he lived and held himself ready and willing to perform. So long as he bestirred himself to sue each six years, he could recover on the theory advanced that, being a *de jure* officer, the salary followed incidentally.

Our conclusion is that the Court of Claims has no jurisdiction in the premises, first, because the action is not *ex contractu*. If it were, the court would have jurisdiction under the Tucker Act, but the usual defenses applicable by the law of employer and employee would be available to the Government. The action would be essentially one for the breach of contract of employment, and the judgment would be conclusive and would not leave the way open for a series of suits which could be maintained so long as the officer enjoyed his exceptional status as a quasi *de jure* officer. Secondly, this suit attempts to hold the sovereign liable for the misfeasance in office of one of its officers, whereas a writ should issue on authority of the sovereign to

determine the relationship between the complainant and the Secretary of the Treasury. The Court of Claims has no such jurisdiction; neither has it jurisdiction by certiorari or similar remedies to review the acts of the Secretary. We submit that the action can not be maintained in the Court of Claims.

II.

Even if appellant was improperly removed from office he delayed bringing any action for the period of two years, which bars him because of laches.

If, as it is urged, a suit for salary is not based on contract, but upon the legal right to the office, it follows that the issue in such suit is the title to the office. The amount of salary due is a mere matter of accounting. But it has been held by this court that jurisdiction to determine the title to a public office belongs exclusively to courts of law and is exercised either by certiorari, error, or appeal mandamus, prohibition, quo warranto, or information in the nature of quo warranto. *Sawyer's case* 124 U. S. 200; *White* v. *Berry*, 171 U. S. 366–377. So if the Court of Claims has jurisdiction to consider a suit of this kind, the remedy must be in the nature of one of the foregoing, whatever the form of the suit. But actions like mandamus, though at law, are equitable in their nature and are not governed by the statute of limitations. *Ex rel Arant* v. *Lane*, 249 U. S. 367. In this last case a delay of twenty months in bringing an action to be reinstated was fatal. It

logically follows that appellant by delaying his action in this case lost by laches his right to determine the title to his office.

III.

The second removal of appellant on April 25, 1914, was lawfully made by an officer having the power of removal after strict compliance with the act of March 24, 1912, and immediately upon removal of appellant the office to which he had been reinstated and appointed was abolished.

The findings show that after appellant prevailed upon the Treasury Department to reinstate him for the purpose of having charges preferred against him, an office was created by the Secretary of the Treasury to which he was appointed and the office was immediately abolished after the charges had been heard. It is clear that by accepting appointment to the new office appellant abandoned the former office, even if it should be held that because of the disregard of the act of August 24, 1912, he was never legally removed, and therefore *de jure*. So whatever rights he had at the time he was dismissed from the service in 1913 were ended when he accepted appointment to another office in the winter of 1914. (Act of May 10, 1916, ch. 117, sec. 6, 39 Stat., 120, amended Aug. 29, 1916, ch. 417, 39 Stat., 582; U. S. Comp. Stat., 1918, sec. 3230a).

Appellant was removed on April 25, 1914, from this second office to which he had been appointed

after he insisted upon having his case reviewed by the Treasury Department. The removal, it appears from the findings, was directed by the Assistant Secretary of the Treasury, and the point is made by the appellant that that officer was without power to effect the removal and consequently that no removal ensued, although it appears from the findings that the procedure prescribed by statute was strictly adhered to.

This contention of the defendant has been frequently made and has always been overruled. It must be apparent that in any of the great departments of our Government there is a body of detail work which must be performed by persons other than the head of the department. The statutes make provision for Assistant Secretaries of the Treasury.

Revised statutes, section 161, provides:

> The head of a department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, *the distribution and performance of its business,* and the custody, use, and preservation of the records, papers, and property appertaining to it.

Revised Statutes, section 245, provides:

> The Assistant Secretaries of the Treasury shall examine letters, contracts, and warrants prepared for the signature of the Secretary of the Treasury, *and perform*

such other duties in the office of the Secretary of the Treasury as may be prescribed by the Secretary or by law.

In *McCollum* v. *United States* (17 Ct. Cls. 92, 101), the court, speaking of the general duties of assistants, said:

> The duties of these assistants are generally not specifically defined by law, but are left to the direction and regulation of superior officers Such assistants are supposed to have the confidence of those immediately above them, and to be officially engaged in carrying out the will of their principals in the details of the work of the department or bureau in which they are employed.
>
> When their acts, *decisions,* or directions are reduced to writing, signed by them in their official capacity, filed or recorded among the archives of the department, and do not appear to have been revoked, annulled, or modified by the head of the department or bureau, they must be held, in the absence of fraud, mistake, or irregularity, to have been done within the scope of the authority of the assistant, and to be as binding on the Government as though expressly ordered by the superior. *Especially is that so when copies of such written documents are sent to this court by the head of the department in which they are found, without objection on his part to their having been made in the due and regular course of business under his control.* [Italics ours.]

In *Chadwick* v. *United States* (3 Fed. R. 751), a suit to recover moneys withheld by a collector of internal revenue, objection was made to the admission of a transcript certified by an Assistant Secretary of the Treasury. The court (p. 756) said:

> Assistant Secretaries in the Treasury Department are appointed under the authority of an act of Congress, with power to perform such duties in the office of the head of the department as he may prescribe or as the law directs. * * * Nothing appearing to the contrary, the legal presumption is that the certificate was made in pursuance of a lawful authority. * * *

In *Adams* v. *United States*, 24 Fed. R. 348, the court said (p. 351):

> An " assistant " is one who stands by and helps or aids another, * * *. Any duty pertaining to his office which the Secretary may prescribe for him, such assistant may do. * * * But I think that an act done by the assistant and within the authority and power of the department, must, until the contrary appears, be presumed to have been done under the direction of the Secretary of the Treasury.

In the case of *Shillito Co.* v. *McClung* 51 Fed. R. 868, it was contended that an Assistant Secretary of the Treasury had no authority to decide an appeal in a customs case. But the Circuit Court of Appeals, consisting of Judges Jackson and Taft,

after an exhaustive review (p. 871) of the entire situation and full citation of authority, said (p. 872):

> We think these authorities state the correct principle to be applied to the action of the Assistant Secretary in the present case. If not appearing to the contrary, his authority to decide the appeal must be presumed.

In *re Way Tai*, 96 Fed. R. 484, it was contended that an Assistant Secretary of the Treasury could not hear and determine appeals in Chinese exclusion cases, but the court (p. 486) said:

> It may be assumed that the Secretary has conferred upon the Assistant Secretary who acted in the present case the authority to act in the matter of the appeal of the petitioner's case, and it would seem that, under the statute above quoted, the authority is one that may be delegated.

In *Parish* v. *United States* 100 U. S. 500, the Supreme Court (p. 504) said:

> The Office of the Surgeon General is one of the distinct or separate bureaus of the administrative service of the War Department. It has been found, in regard to many of these bureaus, and even to the heads of departments, that it is impossible for a single individual to perform in person all the duties imposed on him by his office. Hence, statutes have been made creating the office of assistant secretaries for all the heads of departments.

> It would be a very singular doctrine and subversive of the purposes for which these latter offices were created, if their acts are to be held of no force until ratified by the principal secretary or head of department.

See also *Turner* v. *Seep*, 167 Fed. R. 646, 649.

In 18 Op. Atty. Gen. 432, it is held that section 439, Revised Statutes (similar in all respects to R. S., 245), empowers the Secretary of the Interior:

> to make the assistant * * * his deputy in all things. * * * So long as the powers delegated to the Assistant Secretary of the Interior by his superior remain unrevoked, the authority of the former is coordinate and concurrent with that of the latter.

The conclusions reached in the above authorities are equally applicable here. The court can take notice that the Customs Division of the Treasury Department is in itself a business of such magnitude as to require the complete attention of one executive and that an Assistant Secretary is always assigned in charge of customs. Acquiescence in the acts of the Assistant Secretaries by the Secretary is in itself sufficient in law to indicate adoption on his part. The hair-splitting contention of appellant that the letter authorizing removal was not directed by the Secretary himself simply amounts to the assertion that the Assistant Secretary before signing the letter did not type at the end thereof, "by direction of the Secretary." In either event, the Secretary himself would probably have known

nothing of the matter, and to argue that these words have magic is to forget substance for form.

But the appellant argues that even if the acts of the Assistant Secretary were those of the Secretary, still the conclusion reached was that the charges were not sustained. It can not be denied that on this occasion there was compliance in every detail with the act of August 24, 1912. Appellant was dismissed, and the courts will not review the reasons. *Keim* v. *United States*, 177 U. S. 290. At best the act only guarantees that the officer is privileged to have charges preferred against him and an opportunity to answer them. That is the only qualification, even if the act is mandatory on the power to dismiss. If the appointing power then exercises the right to dismiss, even if he be personally of the opinion that the charges are not sustained, the dismissal is nevertheless absolute. The procedure required by the statute was complied with, which satisfies the law and prevents interference by the courts.

Regardless of the conclusion reached at the time of the second removal, the office which appellant held was abolished, and there was no vacancy for him in the service. It is elementary that the sovereign may abolish an office and put an end to the services. In *Crenshaw* v. *United States*, 134 U. S. 99, at 108, Justice Lamar said:

> Whatever the form of the statute, the officer under it does not hold by contract. He enjoys a privilege revocable by the sov-

ereignty at will; and one legislature can not deprive its successor of the power of revocation. *Butler* v. *Pennsylvania, supra,* 10 How. 402; *Stone* v. *Mississippi,* 101 U. S. 814; *United States* v. *McDonald,* 128 U. S. 471–473.

Congress, in the case of inspectors of customs, has delegated to the Secretary of the Treasury all of the details of appointment and judgment as to the number of offices of inspectors. See act of March 2, 1799 *ante* and various appropriation acts cited under footnote 1. No attempt has ever been made by Congress to fix the number of offices to be filled. The Secretary of the Treasury has been required from time to time to reorganize the customs service. See act of March 4, 1909, chap. 314, 35 Stat. 1065, and also act of August 24, 1912, chap. 355, 37 Stat. 434, U. S. Comp. Stat. 1916, sec. 5327. On these occasions he reported his schedules to Congress upon which lump-sum appropriations were based. It was entirely within his discretion to fix the number of employees needed for the service, which, on the theory that there is an office of inspector, must be synonomous with fixing the number of offices.

In this case, an office was created by the Secretary, to which appellent was appointed. He was suspended from that office pending charges, and when he was removed the office was abolished by the Secretary, or his representative, the Assistant Secretary. Consequently, the office ceased to exist at the very time that appellant was removed, so that

he can not now sue for a salary as incident to an office where there was no office.

IV.

Where a de facto officer performs the services and receives the emoluments of an office the de jure officer can not recover the salary.

It is now the general rule by weight of authority and a rule which is growing in favor that payment to a *de facto* public officer of the salary of the office while he is in possession is a valid defense to an action for salary and prevents recovery by the *de jure* officer.

In the case of *Dolan* v. *Mayor of New York,* 68 N. Y. 274–280, the court said:

> It is clear that if the city could rightfully pay the salary of Keating during his actual incumbency, and has paid it, it can not be required to pay it again to the plaintiff. We are of opinion that payment to a *de facto* public officer of the salary of the office, made while he is in possession, is a good defense to an action brought by the *de jure* officer to recover the same salary after he has acquired or regained possession.

Lee v. *Wilmington,* 1 Marvel (Delaware) 65, contains a full discussion of the whole question, the conclusion of the court being in accord with the principle above stated.

Coughlin v. *McElroy,* 74 Conn. 397, also reviews the authorities and finds them in accord with the above principle.

See also:

Brown v. *Tama Co.*, 122 Iowa, 745.
Saline County Commissioners v. *Anderson*, 20 Kans. 298.
Wayne County v. *Benoit*, 20 Mich. 176.
Parker v. *Dakota County*, 4 Minn. 59.
Hunter v. *Chandler*, 45 Mo. 452.
McDonald v. *Newark*, 58 N. J. Law, 12.
Samuels v. *Harrington*, 43 Wash. 603.
State v. *Moores*, 70 Nebr. 48, 57.
Throop Public Officers, 510.

In a note to the case of *Nall* v. *Coulter*, 4 Ann. Cas. 671 (117 Ky. 747), the authorities are reviewed and the reviewer finds the weight of authority to be overwhelmingly in favor of our principal proposition. The recent cases of *People* v. *Burdett*, 283 Ill. 124, and *People* v. *Schmidt*, 281 Ill. 211, show that the Supreme Court of Illinois, although at one time it took a contrary view of the subject, has now overruled its former decisions and is in accord with the weight of authority. See also Mechem on Public Officers, section 332.

There is no specific finding in the record as to when appellant's office was filled, but the findings do show that when he was reappointed an inspector on February 20, 1914, for the purpose of having charges preferred against him, there was no vacancy in the office of inspector at Baltimore. An office was created for him and immediately abolished. Findings also show that subsequent to that time there was no vacancy in the office of inspector

at Baltimore. Consequently, it logically follows that the office which he held at the time of his earlier dismissal—that is, February 20, 1913—had been filled by another appointee prior to February 20, 1914. For the period subsequent to that time it is quite clear there can be no recovery. But shortly after appellant was dismissed the first time a report of the permanent organization of the customs service was reported to Congress on March 3, 1913. Thirty-three inspectors were provided for the district of Maryland, which includes the port of Baltimore. It is the necessary presumption that these offices were filled at the time this reorganization was made, for the presidential order provided that:

> All persons now in the classified Civil Service whose employment may be discontinued by reason of this reorganization shall be retained upon the list of eligibles for appointment to fill any vacancies hereafter occuring in the customs service.

In addition to this presumption the Court of Claims has found as a fact in the *Nicholas case*, No. 47, that these positions were filled on March 3, 1913, by persons appointed by the Secretary of the Treasury. Under the authorities therefore, there can be no recovery for the salary claimed as incidental to this office where it is shown that, conceding the appellant to be a *de jure* officer for the purpose of argument, a *de facto* officer has filled the position and has been paid the salary of the office.

CONCLUSION.

In conclusion it is respectfully submitted that the Court of Claims has no jurisdiction under the Tucker Act to adjudicate a case of this nature; that, if that court has such jurisdiction from the nature of the case, the right of action is barred by laches where the claimant negligently fails to prosecute his case promptly; that the second removal made on April 25, 1914, was absolute and lawful for the reason that the provisions of the statute were complied with and the act of the Assistant Secretary of the Treasury was the act of the Secretary; and, finally, payment having been made to a *de facto* officer, the *de jure* officer can not recover for the period when said payment was made.

FRANK DAVIS, JR.,
Assistant Attorney General.

WILLIAM D. HARRIS, *Attorney.*

FEBRUARY, 1921.

○

Supreme Court of the United States

OCTOBER TERM, 1920.

No. [redacted]11

WILSON SCOTT NORRIS,
Appellant,

against

THE UNITED STATES.

APPELLANT'S REPLY BRIEF

WILLIAM E. RUSSELL,
LOUIS T. MICHENER,
PERRY G. MICHENER,
Attorneys for Appellant.

Supreme Court of the United States,

OCTOBER TERM, 1920.

WILSON SCOTT NORRIS, Appellant, against THE UNITED STATES.	No. 48.

APPELLANT'S REPLY BRIEF.

I.

This action does not sound in tort, as contended by the United States. It is based on the deprivation of rights fixed by statutes. The position taken by opposing counsel that the action sounds in tort (pp. 5 and 6) and that the Court of Claims had no jurisdiction because it is denied jurisdiction of tort claims, we meet by pointing out that the Court of Claims has always taken jurisdiction of actions against the United States growing out of alleged wrongful suspension and removal from office (see the numerous cases digested in Maupin's Court of Claims Digest, pp. 540, 541, 542, 543, covering the first forty volumes of the reports of that court. The succeeding 14 volumes contain a number of such cases and in all of them jurisdiction was taken. We cite a few of such cases decided by that court:

Perkins vs. *United States*, 20 C. Cls. 438;
Turner vs. *United States*, 21 C. Cls. 24;
McAllister vs. *United States*, 22 C. Cls. 318;
Gleeson vs. *United States*, 23 C. Cls. 207;
Parsons vs. *United States*, 30 C. Cls. 222;
Keim vs. *United States*, 33 C. Cls. 174;
Reagan vs. *United States*, 35 C. Cls. 90;
Shurtleff vs. *United States*, 36 C. Cls. 311;
Lellman vs. *United States*, 37 C. Cls. 128;
Wickersham vs. *United States*, 39 C. Cls. 558;
Costello vs. *United States*, 51 C. Cls. 257.

Of the cases above cited, there reached this court on appeal the following:

McAllister vs. *United States*, 141 U. S. 174;
Parsons vs. *United States*, 167 U. S. 324;
Keim vs. *United States*, 177 U. S. 290;
Reagan vs. *United States*, 182 U. S. 419;
Shurtleff vs. *United States*, 189 U. S. 311;
Perkins vs. *United States*, 116 U. S. 483;
United States vs. *Wickersham*, 201 U. S. 390.

In none of those cases did this court decide against the jurisdiction of the Court of Claims, and we have found no case in which this court has denied the jurisdiction of that court over cases involving the alleged wrongful suspension

or removal of officers or employees of the United States.

It may be that the jurisdiction of the Court of Claims was not challenged in any of those cases, but the rule is well established that it is the first duty of the court to see that its jurisdiction is not exceeded, as the consent of parties cannot confer jurisdiction.

Chicago Bur. & Quincy R. R. vs. *Willard,* 220 U. S. 413, at page 419;
Louisville & Nashville R. R. vs. *Mottly,* 211 U. S. 149, at page 152;
Minnesota vs. *Northern Securities Co.,* 194 U. S. 48, at page 62;
Minnesota vs. *Hitchcock,* 185 U. S. 373, at page 382;
Metcalf vs. *Watertown,* 128 U. S. 586, at page 587;
M. C. & L. M. Ry. Co. vs. *Swan,* 111 U. S. 379, at page 382.

This court having taken jurisdiction of cases identical with the case at bar, has settled the question beyond a doubt that the Court of Claims has jurisdiction. It is not contended by the appellant that the Court of Claims has jurisdiction of tort claims, but the instant case does not sound in tort as against the United States. It might well be that if the claimant had sued the Secretary of the Treasury as an individual for wrongful removal, the action would then have sounded in tort. Opposing counsel cites the case of *McGraw* vs. *Gresser,* 226 N. Y. 57, as supporting this contention. The foregoing case was a suit by a discharged employee against the officer who re-

moved him. The court did not hold that if the action had been brought against the sovereignty the same would have sounded in tort. In fact, the contrary is the rule in New York.

Fitzsimmons vs. *City of Bklyn*, 102 N. Y. 536.

II.

No claim is made by the appellant that a case of this kind is predicated on a contract or on the Constitution. In the case of *Crenshaw* vs. *United States*, 134 U. S. 99, cited by opposing counsel, a case appealed from the Court of Claims, it was held that an officer of the army or navy does not hold his office by contract, but at the will of the sovereign power alone. The opinion was written by Mr. Justice Lamar, who, on pages 104 to 108, discussed the subject with clearness and force, concluding (page 108) that whatever the form of the statute, the officer does not hold by contract, but enjoys a privilege revocable by the sovereignty at will. Opposing counsel also cites the case of *Burnap* vs. *United States*, 252 U. S. 512, on appeal from the Court of Claims, but an examination of the opinion shows that Burnap's claim was predicated on statutes, as is the instant claim, and that Burnap was claiming statutory rights and privileges only. This court did not hesitate to take jurisdiction in the Burnap case, where the precise question was the one that is involved here; namely, the right to sue the *United States* for alleged wrongful removal from office. It is true Burnap's claim was denied, but on the ground that he was removed by the proper

appointing authority, and that the statutes had been complied with with reference to preferring charges against him and affording him an opportunity of meeting the same. No such state of facts exists in the instant case. The other cases cited by opposing counsel (pp. 7, 8 and 9) on this branch of argument are not in point. Unquestionably, the Court of Claims has jurisdiction of cases founded upon a law of Congress. (Revised Statutes, §1059; Judicial Code, §145, c. 231; 36 Statutes, 1136.)

Norris held a statutory office. (Act of Mar. 2nd, 1799, c. 23, §2; 1 Statutes, 707; R. S. 2733; Act. of Mar. 4th, 1909, c. 314, §2; 35 Statutes, 1065.)

Furthermore, he has the right to maintain this action by virtue of the act of *August 24th, 1912*, c. 389, § 6; 37 Statutes, 555, set forth in part at page 6 of our original brief.

III.

Opposing counsel argues (pp. 8 to 12) that this action will not lie because the title to the office was not first tested by mandamus or quo warranto proceedings. This argument has been met heretofore because it goes to the question of jurisdiction and this jurisdictional question has been long since settled. In none of the cases heretofore cited on this point was there any ruling to such effect. No such requirement was exacted of Burnap in the recent case (*Burnap* vs. *United States*, *supra*). This is an action to recover the salary that would have been paid appellant but for his wrongful ouster. It is not an action to compel the restoration to the office, as was the

case of *Arant* vs. *Lane*, 249 U. S. 367, cited by opposing counsel. There is a wide difference between these two cases, as was pointed out in our original brief. Of course, appellant cannot recover the salary unless the court concludes that he was deprived thereof in violation of law. Appellant has shown that he had the title to the office and that he was removed therefrom in violation of the laws of Congress, and thereby lost the salary attached to the office. It cannot therefore be argued that the matter of title is the question before the court. If it should be held that Norris was wrongfully removed, then there could be no question of title, as he never lost title to the office in question. It is the consequent loss of salary that is involved here; not the restoration of the title. This question is one of legal right into which the exercise of "judicial discretion" or the application of "equitable principles" do not enter (see *Arant* vs. *United States*, *supra*).

The objection now raised by opposing counsel that a discharged employee must first sue out a writ of mandamus or proceed by way of *quo warranto*, was expressly raised in the case of *Tucker* vs. *City of Boston*, 223 Mass. 478, and squarely overruled.

IV.

The record shows (amended Finding II) that following Norris' restoration to office, his subsequent acquittal, and second removal, an attempt was made by the Assistant Secretary of the Treasury to abolish his position. No one was appointed to the "new office" created for Norris after the attempted abolition thereof, and so it cannot

be said that the salary of his office has been paid to another incumbent. At the bottom of page 4, defendant's brief, it is inconsistently argued that Norris' place was filled by another who drew the salary during the period for which appellant makes this claim, and yet that this office was abolished. There is nothing in the record to show that any attempt was ever made to fill the new office created for Norris. Of course, if this "new office" was abolished, no other officer could have received the salary thereof, as there was none paid. This situation affords a further reason for holding that *quo warranto* proceedings would not lie because there was no incumbent of the office to proceed against.

V.

Opposing counsel makes the point (pp. 12 and 13) that appellant, by laches, has lost the right of action despite the six years' statute of limitations. Norris was removed February 20th, 1913, and exactly one year thereafter, through his own efforts, was reinstated and given a new office by the Secretary, a new oath of office being taken March 5th, 1914. The Assistant Secretary, on April 25th, 1914, acquitted Norris of the charges, but directed his second removal and the abolition of the new office, and declared him eligible for reinstatement within one year, or until April 25th, 1915. In that year appellant requested reinstatement on two occasions at least, but was not successful. He filed his petition in the Court of Claims, May 23rd, 1916 (R., top of page 1).

We submit that there is no laches here and that the statute gave appellant six years in which to sue, and he did sue thirteen months after it became apparent that he would not be reinstated.

VI.

On pages 13 to 20, opposing counsel contends that the Assistant Secretary had the power to remove the appellant. As we have stated at pages [illegible] the power of appointment and removal lies in the Secretary alone. The head of the Department is the sole appointing and the sole removing power (Articles 1370, 1385, Customs Laws and Regulations of 1908; see also *Burnap* vs. *United States*, *supra*). Opposing counsel argues that Section 245, Revised Statutes, authorized the Secretary of the Treasury to assign such duties to his assistants as he saw fit and proper. We find no quarrel with this. The fact remains that the Secretary expressly reserved to himself the power of removal of subordinate customs officers (Article 1385, Customs Laws and Regulations of 1908). The power of removal was not one of the powers so delegated. The cases cited by opposing counsel, on pages 14 and 15, all deal with routine duties, and are, therefore, inapplicable to the question before this Court.

VII.

Opposing counsel's argument, on pages 21, 22 and 23, to the effect that Norris cannot recover because the salary of his office was paid to another, is clearly beside the point for the reason that the record convincingly shows that Norris'

"new office," which was never lawfully abolished, was not filled by another. The mere fact that there were thirty-three positions provided for the office of inspector in the District of Maryland does not raise a presumption that such offices were all filled at the time of the reorganization of the customs service in 1913. In fact, reference to the official treasury register of employees for that period shows that there were several deaths, resignations or transfers in the office of inspector of customs for the District of Maryland. As a matter of fact, the number of positions of inspector for the District of Maryland has varied each year. For the fiscal year ending June 30, 1921, the Secretary of the Treasury estimated for thirty-eight inspectors for this district (see House Doc. 459, 66th Congress, 2nd session, at page 15). In our original brief, page 16, a number of cases are cited in which it was held that an employee who is discharged wrongfully could recover the salary of his office even though the same had been paid to another during this period of wrongful removal.

Conclusion.

Wherefore, we submit that claimant is entitled to a judgment of reversal with a direction for the entry of judgment for the amount sued for.

Respectfully submitted,

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Attorneys for Appellant.

NORRIS *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 11. Argued October 5, 1921.—Decided November 7, 1921.

N, having been wrongfully removed from the office of customs inspector, without being furnished a copy of the charges against him or opportunity to answer, as required by the Act of August 24, 1912, c. 389, § 6, 37 Stat. 555, waited eleven months before asserting his rights. He was reinstated for the purpose of affording him a due hearing, suspended from duty and pay meanwhile, and was exonerated, but the office was then abolished and his services dispensed with, for the reason that there was no existing vacancy in the service to which he could be assigned.

Held: (1) That he was not entitled to official pay from the time of his removal to the time of his reinstatement. P. 80. *Nicholas* v. *United States*, *ante*, 71.

(2) The power to determine the number of customs inspectors and to appoint and remove them was lodged with the Secretary of the Treasury. P. 81.

(3) The order abolishing the place to which N was reinstated, made by an assistant secretary and being part of the archives of the Department, must be presumed to have been within the scope of the authority conferred upon the assistant by the Secretary, there being no evidence to the contrary. Rev. Stats., §§ 161, 245. P. 81.

(4) N could not recover pay since the time of his reinstatement. P. 82.

55 Ct. Clms. 208, affirmed.

APPEAL from a judgment of the Court of Claims in a suit to recover the emoluments of an office accruing after appellant's removal from it. See also *ante*, 71, *post*, 82.

Mr. William E. Russell, with whom *Mr. L. T. Michener* and *Mr. P. G. Michener* were on the briefs, for appellant.

Mr. Assistant Attorney General Riter, with whom *Mr. Assistant Attorney General Davis* and *Mr. William D. Harris* were on the brief, for the United States.

MR. JUSTICE DAY delivered the opinion of the court.

This is an appeal from the Court of Claims which was argued and submitted at the same time with No. 10, just decided, *ante*, 71. Judgment was rendered against Norris. 55 Ct. Clms. 208. The case was brought to this court on appeal, and was remanded to the Court of Claims for further findings.

It appears that Norris was a customs employee at the port of Baltimore. On July 2, 1907, he was made a Customs Inspector at the compensation of $4.00 per day. On February 20, 1913, he was advised by the Collector of Customs that his services as inspector would be dispensed with, and his position vacated at the close of business on that day. On December 22, 1913, he addressed a communication to the Secretary of the Treasury in which he stated that he had been dismissed from the service on the previous February 20th; that no reason was assigned for the dismissal, nor charges furnished him, nor opportunity given him to be heard as provided by § 6 of the Act of August 24, 1912, c. 389, 37 Stat. 555. He stated that, therefore, his dismissal seemed contrary to law, and asked for reinstatement, and an examination of his case on the merits as prescribed in that act. The Assistant Secretary of the Treasury, on January 12, 1914, replied in substance that, as it appeared that he had been removed without being furnished a copy of the charges, the Department was willing to request the Civil Service Commission to issue a certificate for his reinstatement, and give him a written copy of the charges which led to his separation from the service. In reply to this letter the claimant wrote the Secretary of the Treasury renewing his request for reinstatement. On February 10, 1914, Norris' rein-

statement was requested in order that he might be furnished with a copy of the charges and allowed to answer them. On the same day the Assistant Secretary wrote the Collector at Baltimore enclosing a letter reinstating the plaintiff, and adding that upon Norris subscribing to the oath of office he would be suspended pending an investigation of the charges. On February 12, 1914, the Treasury Department requested the Civil Service Commission to issue the necessary certificate for the reinstatement of Norris as Inspector of Customs in order that he might be given the opportunity to answer the charges against him. On February 20, 1914, by direction of the Secretary of the Treasury, Norris was reinstated, and appointed an Inspector of Customs in order that he might be given an opportunity to answer the charges which resulted in his removal. Plaintiff executed the oath of office on March 5, 1914. He was suspended from duty and pay, charges were preferred against him. On March 9, 1914, Norris answered the charges. On April 25, 1914, the Treasury Department, by the Assistant Secretary of the Treasury, advised that the Department was of the opinion that the charges and the evidence against the plaintiff were not sufficient to have warranted his dismissal, stating, however, that, inasmuch as there was no vacancy at that time in the force of customs inspectors, plaintiff's services could not be utilized; that the position of inspector was created in order that he might take the oath of office so that the charges against him could be tried; that his services would therefore necessarily be dispensed with; the order would be effective upon receipt of the letter by the Collector of Customs at the port of Baltimore, and the position abolished; that plaintiff was eligible for reinstatement within one year, provided his services could be utilized and he should be properly recommended for an existing vacancy. On May 27, 1914, a letter was written by the President of the National Asso-

ciation of Customs Inspectors asking for the reinstatement of Norris. On June 6, 1914, the Assistant Secretary of the Treasury responded that there was no position of inspector vacant at Baltimore; that Norris was entitled to reinstatement, and, should a vacancy occur, he would be given consideration. On February 18, 1915, the plaintiff wrote a letter to the Secretary of the Treasury asking for reinstatement to the position of inspector of customs.

In the additional findings it appears that after the plaintiff was dismissed he remained a few months in Baltimore, and then went to a farm in Virginia; that he occasionally visited in Baltimore, and that no facts appear to show that he was not ready, willing, and able to perform the duties of the office up to and including May 20, 1916, and at the time of the taking of his deposition in August, 1919.

The question is, upon these findings, and the additional findings: Is the claimant entitled to recover the compensation which is sought by his petition in this case? It appears that during the period of eleven months after his suspension without compliance with the statute, plaintiff took no steps to vindicate his right to the office, nor to recover the compensation incident to the same.

We need not repeat the discussion in the *Nicholas Case*, No. 10, just decided, of the principles which we deem controlling in cases of this character. The question here is: Did Norris use reasonable diligence, in view of the obligation placed upon him, notwithstanding his wrongful removal, to assert his right to the compensation attached to the office? It is true that it has been found that he was ready, willing, and able to discharge its duties, but no fact is found explaining his failure to assert his right to the office, or its emoluments, for the period of eleven months and a little over. He did not, as did Wickersham (201

U. S. 390), promptly demand a restoration to the office, nor make any claim to its emoluments because the power of removal had been exercised without giving him the opportunity for a hearing which the statute affords. Each case must be decided upon its own facts, and we are of opinion that the findings here do not disclose that exercise of reasonable diligence on Norris' part which the law imposes upon him as a duty if he would recover compensation for services in an office which the Government might fill with another, or otherwise adjust its service so as to dispense with the service of the plaintiff. Public policy requires reasonable diligence upon the plaintiff's part, which we think the findings in this record do not disclose.

It is contended that claimant is entitled to recover after his reinstatement, although the office, which the findings show was created for the purpose of affording Norris a hearing, was immediately abolished. If the office was legally abolished, it follows, of course, that the courts cannot afford him relief. The power of the Secretary of the Treasury to determine the number of inspectors to be employed cannot be reasonably questioned. Nor can the power of removal be doubted. It is included in the power to appoint, the statute not otherwise providing. *Burnap* v. *United States*, 252 U. S. 512, 515. The objection urged upon our attention is that the order was made by an Assistant Secretary. We have no doubt of the authority of the Assistant Secretary of the Treasury to take this action. Section 245 of the Revised Statutes provides: "The Assistant Secretaries of the Treasury shall examine letters, contracts, and warrants prepared for the signature of the Secretary of the Treasury, and perform such other duties in the office of the Secretary of the Treasury as may be prescribed by the Secretary or by law." Section 161 of the Revised Statutes gives to the

heads of the Departments the right to prescribe regulations, not inconsistent with law, for the government of their respective departments, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it. Moreover, the action of the Assistant Secretary in this case was reduced to writing and became a part of the archives of the Department. It does not appear to have been modified, nor in any way changed by the Secretary. There is nothing in the record to show that the action of the Assistant Secretary did not have the full sanction and approval of the Secretary. Under such circumstances the act of the Assistant Secretary must be presumed to be within the scope of the authority which the Secretary conferred upon his Assistant. *McCollum* v. *United States,* 17 Ct. Clms. 92.

We are of opinion that after the order restoring Norris for the purpose of a hearing by creating a place for him and abolishing the office after the hearing there can be no recovery. It follows that the judgment of the Court of Claims must be

Affirmed.